IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13-04-2006

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA

WRIT PETITION NO.8882 OF 2004

M/s. Ulagappar Higher Secondary
School, Ramachandrapuram 622505,
Pudukottai District,
Represented by its Secretary. .. Petitioner

Vs.

The Government of Tamil Nadu,
Rep. by its Secretary,
Education Department,
Fort St. George,
Chennai 600 009. .. Respondent

Petition filed under Article 226 of the Constitution of India for the issuance of writ of certiorarified mandamus calling for the records of the Respondent culminating in the Impugned Order No.G.O.No.(2D)5 School Education (D2) Department dated 17.2.2004, quash the same and direct the Respondent to regularize the appointment of the BT Maths Assistant Teachers P. Alagu and SP. Umayal in the vacancy that arose on 6.1.1993 w.e.f. 16.10.1997 and SP. Umayal in the vacancy that arose on 23.4.1997 w.e.f. 27.1.1998.

For Petitioner : Mr.C.A. Diwakar
For Respondent : Mr.S. Gomathynayagam
Special Govt. Pleader

J U D G M E N T

Petitioner is a Private Aided Higher Secondary School. The present writ petition has been filed for issuing a writ of Certiorarified Mandamus to quash G.O.No.(2D)5 School Education (D2) Department dated 17.2.2004 and to direct the respondent to regularise the appointment of BT Maths Assistant Teachers P. Alagu and SP. Umayal against the vacancies which arose on 6.1.1993 and 23.4.1997 with effect from the date of appointment of two teachers, namely, 16.10.1997 and 27.1.1998 respectively.

2. The facts giving rise to the present writ petition are as follows :-

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A vacancy in B.T. Maths Assistant teacher arose in the petitioner school on 6.1.1993 due to migration of a teacher. However, such vacancy could not be filled up as there was a ban. Subsequently, another vacancy arose as a teacher resigned on 23.4.1997. After the ban of recruitment on teachers was lifted, the petitioner requested the District Employment Exchange for sponsoring suitable candidates belonging to Scheduled Caste for filling up the vacancy which had arisen on 6.1.1993. Of the 20 candidates called for the written test and interview, only 12 appeared for the written test and 3 appeared for interview. However, such candidates were found unfit for appointment. The petitioner again requested the District Employment Exchange for a further list of Scheduled Caste candidates and out of 12 candidates sponsored by the Employment Exchange, 6 attended the written test and interview, but none were found suitable. Thereafter the petitioner made another request for sponsoring other Scheduled Caste candidates. At that time, the petitioner also notified about the second vacancy. Out of 20 sponsored Scheduled Caste candidates, only 5 attended the written test and interview, but the candidates were found unfit and unsuitable and the petitioner informed the aforesaid fact to the Employment Exchange. Thereafter, the District Employment Officer by communication dated 15.9.1997 indicated about the non-availability of Scheduled Caste candidates. On the basis of the aforesaid certificate, the school committee decided to call for the candidates from the next turn, i.e., Backward Community, in accordance with the instructions of the District Educational Officer in R.C.No.10613/83/92 dated 15.10.1992. At that stage, the petitioner also decided to fill up the next vacancy that arose on 23.4.1997 available to the next turn, i.e., Other Community. This was done by the school on the basis of an earlier approval granted by the District Educational Officer in a similar situation on 9.3.1984, when non-availability certificate was issued for filling up a temporary vacancy. On the aforesaid basis, the school committee requested the Employment Exchange to sponsor the candidates belonging to Backward Community and Other Community and, on 26.9.1997, the District Employment Officer sponsored candidates belonging to Backward Community and Other Community. After holding a written test and interview, P. Alagu, a candidate belonging to Backward Community was appointed as B.T. Maths Assistant on 16.10.1997 against the vacancy that had arisen on 6.1.1993 and subsequently SP. Umayal, a candidate belonging to Other Community, was appointed on 27.1.1998 against the vacancy that had arisen on 23.4.1997. Subsequently, the District Educational Officer approved the appointment of P. Alagu with effect from 27.1.1998 instead of 16.10.1997 against the vacancy that had arisen in April 1997. By another order, the District Educational Officer rejected the approval of SP. Umayal on the ground that communal reservation has not been followed and further directed that the 1993 vacancy should be kept reserved for Scheduled Caste candidate. At that stage, the petitioner had filed W.P.Nos.18516 & 18517 of 1999, which were dismissed by a learned single Judge of this Court. However, while dismissing the writ petitions,it was observed that if the petitioner chooses to file an appeal or revision against such order of the District Educational Officer, the same shall be disposed of uninfluenced by any of

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the observations and findings made in the order. Against such order of the learned single Judge, the petitioner had filed W.A.Nos.541 and 542 of 2001. In the meantime the petitioner had also filed appeal under Section 41 of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973. While the matter stood thus, the Government had issued G.O.Ms.No.46 dated 21.2.2000 clarifying that all the appointments made in the Private Aided Educational Institutions between the period 12.11.1979 and 21.9.1999 should be governed by G.O.Ms.No.1248 (P&AR) dated 12.11.1979. It is necessary to point out that in the aforesaid G.O.Ms.No.1248 dated 12.11.1979 it has been stipulated that communal reservation system need not be followed where the cadre strength is less than 10. In view of the aforesaid G.O., the petitioner raised additional grounds in the appeal contending that the cadre strength of the petitioner school being less than 5, the school was not bound to follow the communal rotation. However, the appeal filed by the petitioner was rejected by the Joint Director on 12.11.2001. Thereafter, both the writ appeals were dismissed as withdrawn on 3.12.2001 with the observation that it was open to the petitioner to approach the revisional authority under Section 45 of the Tamil Nadu Private Schools (Regulation) Act. Thereafter the petitioner filed such revision on 21.12.2001. Since the revision remained pending for a long period, W.P.No.4258 of 2003 was filed, which was disposed of on 20.2.2003 with a direction to the respondent to dispose of the revision within 8 weeks. However, such revision was not disposed of, forcing the petitioner to file Contempt Petition No.585 of 2003, which was disposed of on 17.10.2003 recording the submission of the Government Pleader that the revision would be disposed of within two weeks. However, the respondent took another four months to dismiss the revision on 17.2.2004. Thereafter the present writ petition has been filed.

3. Learned counsel appearing for the petitioner has contended that so far as the vacancy which had arisen on 6.1.1993 is concerned, petitioner called for the candidates belonging to Scheduled Caste from Employment Exchange, but all the candidates who appeared at the written test and interview were found unsuitable and thereafter the District Employment Officer had issued a certificate of non-availability of Scheduled Caste candidates and, therefore, the petitioner rightly decided to fill up the vacancy from the Backward Community, which was the next turn. Such appointment having been made on 16.10.1997, the approval should have been accorded with effect from that date. It is also submitted that since non-availability certificate had been duly issued, the authority concerned should not have treated such appointment as an appointment against Backward Community quota and on the other hand such appointment should have been considered as against the vacancy of the year 1993. It has been further submitted that since Scheduled caste candidate was not available and a further vacancy had already arisen by the time the selection had taken place, the school authority had rightly considered filling up the post from Other Community. It is submitted that since the question of teaching in a school was involved, obviously the school was not in a position to wait indefinitely for a suitable candidate belonging

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to Scheduled Caste and, therefore, both the appointments should have been approved from the date on which such appointments were made against the clear vacancy. Learned counsel has raised a further contention that in view of G.O.Ms.No.1248 dated 12.11.1979 the school was not obliged to follow the communal rotation as the cadre strength was less than 10.

4. A counter affidavit has been filed on behalf of the State, wherein it is indicated that reservation policy was required to be followed in view of Rule 15 of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973. It has been further submitted that even though on three occasions the Scheduled Caste candidates sponsored by the Employment Exchange were found unsuitable, the petitioner should have kept such vacancy to be filled up by Scheduled Caste candidate and, therefore, the authority had rightly approved the appointment of P. Alagu against the vacancy which was meant for Backward Community as P. Alagu belongs to Backward Community. It is further indicated that G.O.Ms.No.1248 dated 12.11.1979 is only being an order passed by the Government, in the absence of any Rule being challenged, the Rule is required to be followed.

5. So far as the appointment of P. Alagu is concerned, obviously such appointment had been specifically made against the vacancy which had arisen in the year 1993. Even assuming that at that stage the communal roster was to be followed, the petitioner had taken sufficient steps to fill up the post from among the candidates belonging to Scheduled Caste, but unfortunately no candidate belonging to Scheduled Caste was found suitable inspite of the fact that three written tests followed by interview had been conducted. In this connection, it is also to be noticed that in fact the Employment Exchange had issued a non-availability certificate and, therefore, the school authority was justified in selecting a candidate belonging to Backward Community as the next roster point was meant for Backward Community. Since such appointment was admittedly made on 16.10.1997 following the procedure prescribed, there is no reason as to why such appointment was not considered against the vacancy of the year 1993. There is no rhyme or reason as to why such appointment is to be considered as a vacancy against Backward Community as the earlier vacancy available to be filled up subsequently.

6. The next question relates to appointment of SP. Umayal. At the time steps for such appointment were taken, the Employment Exchange had already notified about the non-availability of Scheduled Caste candidates and, therefore, steps were taken for filling up the post from Backward Community, which is the next point in the roster system, the school committee sought for candidates belonging to the next roster point, namely, the Other Community. Even assuming that there was some irregularity in such a step, the effect of G.O.Ms.No.1248 dated 12.11.1979 and G.O.Ms.No.46 dated 21.2.2000 is required to be considered.

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7. G.O.Ms.No.1248 dated 12.11.1979 relates to Rule of Reservation of appointment to all categories of posts, the cadre strength of which is 10 and above by amending Special Rules concerned. In such order it has been recited that Rule of Reservation has been incorporated in Rule 22 of the General rules. In the Special Rules for most of the categories, provision for application of the Rule of Reservation has already been incorporated in respect of certain categories where the cadre strength is 25 or more. By taking into consideration the recommendation made by the High Power Monitoring Committee, the Government decided to accept and follow such recommendation, which is to the following effect :-

> "3. In pursuance of the above decision, the Government direct that the Rule of Reservation as provided in rule 22 of the General Rules for the Tamilnadu State and Subordinate Services be made applicable at the time of direct recruitment to all categories of posts, the cadre strength of which is 10 and above."

8. It appears that G.O.Ms.No.1248 dated 12.11.1979 has been subsequently modified substantially by G.O.Ms.No.162 dated 21.9.1999. In such order it was indicated that the Rule of Reservation is applicable to the posts, where the cadre strength is more than one.

9. G.O.No.46 (School Education.(B1) dated 21.2.2000 is to the following effect :-

> " ORDER
>
> In the Government order No.1248 (P & A.R.) dt.12.11.79 read in the reference (1) cited, it has been stated that communal rotation system for direct recruitment should be adapted while the total cadre strength is above ten. This system has to be followed for direct recruitment in Government offices. But this was not effected to Private Aided Schools. Rules 15(7)(8)(9) of Tamilnadu Recognised Private Schools (Regulation) Act are being followed for 20 years after the issue of order (1979). Meanwhile, Government cancelled the orders issued in G.O.Ms.No.1248 (P.&A.R.) dt. 12.11.79 and issued orders in G.O.No.162 (P.&A.R.) dt. 21.9.1999 to follow the communal rotation system for direct recruitment when the total cadre strength is one and above. The Director of Elementary Education has sought for clarifications in this regard as follows :-
>
> As per G.O.Ms.No.1248, during the period from 12.11.79 to the date of issue of G.O.Ms.No.162 dt. 21.9.99, in so far as the Private Aided Educational Institutions are concerned (Non-minority schools), having 10 and less cadre strength need not follow the communal rotation system. The Director of Elementary Education has sought for clarificatory orders of the Government on his above presumption and to confirm as to whether the orders

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issued in G.O.Ms.No.162 (P.A.R.) dt.21.9.99 are applicable to Private Aided Schools.

After examining the proposal, Government issue clarificatory orders in the above points that G.O.Ms.No.1248 (P.&A.R.) dt. 12.11.79 is applicable to Private Aided Educational Institutions and in hereafter, the present Govt. Order No.162 (P.&A.R.) dt.21.9.99 will be made applicable to the Aided Schools from the date of issue of order and the orders issued in G.O.Ms.No.1248 (P.&A.R.) dt. 12.11.79 may be effected to the appointment made in Private Aided Educational Institutions till the date of issue of orders in G.O.Ms.No.162 (P.&A.R.). On the strength of the above, necessary amendment is to be issued to the Tamilnadu Recognised Private Schools (Regulation)Act, for which, the Director of Elementary Education in consultation with the Director of School Education is requested to send necessary proposal for issuing amendment to the Rules. ..."

10. A conjoint reading of the aforesaid three G.Os leaves no room for doubt that as per the Government's decision, reservation is required to be followed when the cadre strength was 10 or more. However, in 1999, the Government took a decision that reservation is required to be followed when the cadre strength was more than one. By G.O.Ms.No.46 dated 21.2.2000 it is made clear that till 1999, in Private Aided Schools, reservation need not have been followed, if the cadre strength was less than ten.

11. In the present case, the vacancy had arisen in the year 1997 and appointment has been made in the year 1998. Therefore, by applying G.O.Ms.No.46, there cannot be any doubt that appointment of SP. Umayal, candidate belonging to Other Community, need not have been disapproved merely because such person did not belong to the reserved category as it was open to the school authority not to follow the reservation system since the cadre strength was less than ten.

12. In this connection, the Special Government Pleader has raised an ingenuous contention to the effect that total strength of employees in the school including that of clerical and class IV employees being more than 10, the school was bound to follow the reservation system even in accordance with G.O.Ms.No.1248 dated 12.11.1979.

13. Such a submission cannot be countenanced at all. The cadre strength as indicated in the G.O.Ms.No.1248 would obviously mean the strength in a particular type of employment. The B.T. Assistant teachers obviously would form a separate cadre and it cannot be said that cadre strength would be more than 10 merely because clerical staff and Class-IV staff in addition to B.T. Assistant teachers would make it more than 10. If such a contention is accepted, it would give rise to startling results. For example, total number of teachers in a school is 7 or 8 and by adding the clerical staff and Class-IV staff it becomes more than 10

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and reservation if applied, it would be not known to which post reservation would apply, that is to say, whether for the teachers or clerical staff or Class-IV staff. The expression "cadre strength" should be understood in its ordinary meaning so that it can only mean the strength of teachers in that particular category, namely, B.T. Assistant teachers, and it may not even include the teacher of another category, namely P.T. Assistant.

14. For the aforesaid reasons, the order passed by the respondent is quashed and the concerned authority is directed to reconsider the question of approval of P. Alagu and SP. Umayal with effect from the respective dates of such appointment in the light of the observations made earlier. If it is found that selection has been otherwise made in accordance with the procedure contemplated, the respondent should accord approval from the date of appointment and approval should not be refused on the ground that communal roster was not followed. This may be done within a period of eight weeks from the date of receipt of the order. Accordingly, the writ petition is allowed. No costs.

dpk

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

To

The Government of Tamil Nadu,
Rep. by its Secretary,
Education Department,
Fort St. George,
Chennai 600 009.

+ 1 CC To M/S.C.A.Diwakar,K.Chandrasekaran, Advocate, SR NO.18711.
+ 1 CC to the Government Pleader SR NO 18845.

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